

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
Plaintiff,) Criminal Action
v.) No. 21-10035-ADB
FAITH NEWTON,)
Defendant.)

CHARGE CONFERENCE

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE

July 6, 2023
8:30 a.m.

John J. Moakley United States Courthouse
Courtroom No. 17
One Courthouse Way
Boston, Massachusetts 02210

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1 P R O C E E D I N G S

2 (The following proceedings were held in open court
3 before the Honorable Allison D. Burroughs, United States
4 District Judge, United States District Court, District of
5 Massachusetts, at the John J. Moakley United States Courthouse,
6 One Courthouse Way, Courtroom 17, Boston, Massachusetts, on
7 July 6, 2023.)

8 MR. BRADY: Good morning, Your Honor. Bill Brady for
9 the United States. I know we are here this morning for the
08:30 10 charge conference. There is one matter that we wanted to bring
11 to the court's attention. We just mentioned this to the
12 defense as well, and we just wanted to start there.

13 MR. LOONEY: Yeah. So yesterday, you recall the
14 government put on Dr. Anthony Eaton. We provided reports from
15 our investigation about him. During a debrief session last
16 night, we were informed that he is or had at some point been
17 the subject of a separate investigation by the Drug Enforcement
18 Agency regarding whether he illicitly distributed prescribed
19 narcotics, whether he ran a pill mill, essentially.

08:31 20 That was the first I became aware of it or Mr. Brady
21 became aware of it. We are in the process of obtaining
22 information concerning it. We've informed Mr. Vien. We are
23 and we will provide whatever information we get, we learn, to
24 Mr. Vien about this as promptly as we can. We are hopeful that
25 it doesn't derail the schedule, but we'll do whatever we can,

1 whatever we need to do to address this.

2 MR. VIEN: Could I just give you my position on it? I
3 don't know why they're so sensitive about allegations of
4 misconduct, but I'm not making any. I believe that they did
5 everything appropriate, and they were as surprised by this, and
6 they did their due diligence, and things happen and it came out
7 after the fact. So let me say that first.

8 MR. LOONEY: I appreciate that.

9 MR. BRADY: Thank you.

08:32 10 THE COURT: They are very sensitive about it.

11 MR. VIEN: They are very sensitive about it.

12 MR. BRADY: It's a big deal to us. I appreciate that,
13 Mr. Vien.

14 MR. VIEN: When you don't have a career or future,
15 things don't bother you as much. That's my perspective on it.

16 THE COURT: My perspective is you just had to be
17 thicker-skinned about it 20 years ago than people are now.

18 MR. VIEN: You know, I was going to say that. It was
19 a different world where it was commonplace. But anyway, I
08:33 20 think they're getting more information. They're going to
21 provide us with the information when they get it, and then we
22 can figure out what to do at that point. I think it's too
23 early to suggest a course, and maybe we -- I don't want to say
24 "respectfully." Maybe we just continue on our schedule and we
25 can figure out later in the day what we should do, if anything

1 else.

2 THE COURT: I mean, that makes sense to me. It seems
3 to me that there's almost nothing that an instruction to the
4 jury can't solve. So I have to go back through the testimony.
5 But was he actually untruthful on the stand yesterday about
6 anything or just wasn't asked?

7 MR. LOONEY: He was not asked about it.

8 THE COURT: Okay.

9 MR. VIEN: That's my memory, Your Honor.

08:33 10 THE COURT: Okay. Did Jamie know about it?

11 MR. BRADY: I would imagine so.

12 MR. LOONEY: Actually, I do not know. He has never
13 discussed or described it to me.

14 THE COURT: That might have been something he could
15 have mentioned.

16 MR. LOONEY: I don't know if he knows that. I don't
17 know the progress of that investigation.

18 THE COURT: All right. Let's go to work on the jury
19 instructions. I have the defendant's submission from last
08:34 20 night. Let's just run through that first because it's in
writing, and I can work on it from the bench this morning.

22 MR. BRADY: I'm not sure --

23 MS. PASCUCCI: It was midday yesterday.

24 MR. BRADY: We're trying, Your Honor. We're trying,
25 Your Honor.

1 MR. VIEN: It's right here, right.

2 MR. BRADY: You all have a copy? That is so weird.
3 I'm not sure -- I think between the two of us we must have
4 missed the ECF.

5 THE COURT: I didn't see it until this morning. I
6 don't know what time it got filed last night.

7 MR. BRADY: Usually when one of us screws up the other
8 one catches it.

9 THE COURT: So far today I've made four breakfasts,
08:35 10 four lunches, dealt with the tree guy, and read the jury
11 instructions.

12 MR. BRADY: What have we done?

13 THE COURT: It was the tree guy that threw me off. I
14 don't know what he was doing at my house this morning. I've
15 had no coffee as a result of the tree guy, I will say that.
16 Let's just go, let's go through it.

17 MR. BRADY: Maybe we can figure it out, Your Honor.

18 THE COURT: Let me go through this generally. They
19 are first asking for a different cooperating witness
08:35 20 instruction. I think that they want their own language, but I
21 think they mostly want the name of the cooperating witness
22 referenced. So I will go through and make some changes to
23 that. I'll redline it. I'll add the specific name of the
24 cooperating witness. There's only been one. But I'm not going
25 to give the instruction wholesale. So you can take a look at

1 the next version and see what you think.

2 MR. BRADY: Okay, Your Honor.

3 THE COURT: The second one is, they want an
4 instruction about the sentencing guidelines given the testimony
5 about Winnie Waruru's plea agreement. So I think on the
6 instruction about punishment, I will add something about how
7 punishment is individually determined, and maybe -- I'm not
8 giving anything nearly this long, but I will reference the
9 sentencing guidelines for them, and you can take a look at that
08:36 10 as well.

11 I already made -- the third one is the regulatory
12 instruction, and I already made those edits. I don't think I
13 added anything. Are you talking about just the -- are you
14 talking specifically about the overt act instruction?

15 MS. PASCUCCI: No, Your Honor. Just to clarify, this
16 was filed midday while we were at trial yesterday by our
17 associate in the office, so this wasn't responding to the jury
18 instructions that were circulated yesterday evening. I think
19 the health care, we still have some issues with as to the
08:37 20 unanimousness language, but I think point three, we're fine on
21 that point.

22 THE COURT: Okay. I really didn't know what that one
23 was talking about. As I said, I had something much weaker.
24 They agreed to yours and I put it in.

25 MR. BRADY: We blew it, Your Honor.

1 THE COURT: You didn't blow it. It's perfectly
2 accurate each way. I try to be -- these are always long. I
3 just try and be short because I think if we have any hope of
4 the jury actually understanding at all that briefer is better.
5 I'm telling you, I go back to the jury room after these things,
6 and these copies of the instructions are dog-eared. They spend
7 a lot of time with them. It's just a matter of trying to be
8 succinct.

9 And their last thing is, which is the only one that's
08:38 10 sort of meaty enough to warrant instruction at this point is
11 that they don't like your unanimity instruction or your anti-
12 unanimity instruction on whether or not they have to be
13 unanimous on about the different types of fraud.

14 MR. BRADY: I think, Your Honor, we submitted law on
15 this, which I think the court had the benefit of seeing in
16 crafting the instruction in the draft, and we think that's
17 consistent with what the law is in the circuit.

18 THE COURT: Okay. I'll take a look at that one while
19 we're going as well. So those are in writing. They're easier
08:38 20 to deal with. I'll circulate a redline later. What else?

21 MR. VIEN: I think we have a money laundering issue
22 about commingling of funds. And what it is is the language in
23 1956 is different from the language in 1957. Where in 1957 --
24 1956 says involving, you know, proceeds of specified --
25 transaction involving proceeds is specified unlawful activity

1 while 1957 doesn't say involving. It says with proceeds
2 specified in unlawful activity. So we need -- and if there's
3 going to be a commingled funds issue, then I would ask for an
4 instruction that says you have to have enough basically dirty
5 money.

6 THE COURT: Right, I understand. So I saw your
7 initial instruction on that. I didn't put it in because I
8 don't know what the evidence is. Are we talking about a
9 commingled account? I didn't know what we were talking about.
08:39 10 It's a complicated instruction that you only need under certain
11 circumstances, and I wasn't sure if those circumstances
12 existed.

13 MR. VIEN: I have just -- and I don't mean to be
14 presumptuous. We wrote some language on this issue. I don't
15 know if it's helpful to the court or if it isn't helpful, but
16 I'll put it on Karen's desk.

17 THE COURT: Can you just walk it here?

18 MR. VIEN: I would prefer to walk it up.

19 THE COURT: I'm not going to touch to you. Pass the
08:40 20 piece of paper.

21 MR. VIEN: Honestly, I'm not worried about you. It's
22 Mr. Brady.

23 MR. BRADY: I read the transcript from yesterday in
24 horror. You would think from the transcript I put Mr. Vien in
25 a headlock at sidebar.

1 THE COURT: That's not what you think if you read the
2 transcript. You fondled him inappropriately is what you would
3 think if you read the transcript.

4 MR. BRADY: That's probably worse, Your Honor. I will
5 stop talking.

6 THE COURT: It probably is. Just don't touch him. I
7 know that George has an array of issues. This is a new one for
8 me.

9 08:40 10 MR. BRADY: I've learned a lot in this trial, Your
Honor.

11 THE COURT: Is this basically the same instruction as
12 in your proposed charge, or is this something different?

13 MR. VIEN: It's pretty close, Your Honor.

14 THE COURT: So it's the same idea.

15 MR. VIEN: On the unanimity issue, I also have some
16 language in a case that says you can instruct, if you want to.
17 The government is right, you don't have to. But you can if you
18 want to. And I'll just hand that up as well.

19 THE COURT: All right. To the government, one of you,
08:41 20 what's the deal on the bank accounts? Is that going to be an
issue?

22 MR. LOONEY: What we expect the evidence to show, they
23 received or the Arbor bank accounts received 160-odd million
24 dollars in proceeds from MassHealth. 100 million of that came
25 from home health aides. We believe all of that is proceeds of

1 unlawful activity because none of them were trained and
2 certified and qualified. And Ms. Dossa testified those would
3 not have been paid out if MassHealth had known that. That
4 constitutes the two-thirds majority of the amounts.

5 The rest is tainted in a way that we can't quantify
6 them by services that weren't rendered, kickbacks, all the
7 other issues. So the vast majority of the funds in the Arbor
8 accounts were tainted, and that's all, what we will then show
9 that flows into Ms. Newton's accounts and is used for specified
08:42 10 transactions.

11 So we believe we will, reading this briefly, we will
12 satisfy this rule that, where it was commingled funds, we need
13 to show that the amount of the tainted funds exceeds the
14 non-tainted funds, comfortably.

15 THE COURT: You're not objecting to the instruction
16 then.

17 MR. LOONEY: I think it makes it so complex that it
18 may be unnecessary, and I have not focused on this instruction
19 issue.

08:42 20 THE COURT: I'm going to put something in then because
21 you're talking about a commingled account.

22 MR. LOONEY: It all comes from Arbor. It's all
23 proceeds of the business, but there is some sense that there is
24 untainted money in there.

25 THE COURT: If there's some legitimate money in there,

1 it's a commingled account. Look, for me, jury instructions,
2 there are three things, right, or two things. I want to
3 instruct the jury in a way that they can understand it, and I
4 want to make sure we don't do this again over a reasonably
5 requested charge from either side that I don't include.

6 MR. LOONEY: Understood.

7 THE COURT: There's no place easier to get overturned
8 than on a jury charge. Bill Young once told me I only have to
9 get three out of five evidentiary rulings, right, so I do the
08:43 10 best I can on those, but jury instructions are something where
11 you really have a chance to think about it. And I work hard
12 both to get them right and to cover all of our butts. So I'm
13 going to put in something on the commingling on the
14 butt-covering theory --

15 MR. LOONEY: Thank you.

16 THE COURT: -- clearly and easily communicating a lot
17 of the jury that's going in. I'll try and do it clearly, and
18 I'll show you another draft. So hopefully at lunch I'll give
19 you another draft.

08:44 20 MR. LOONEY: Thank you.

21 THE COURT: What else?

22 MR. VIEN: I have a few small issues. I might be
23 working off an earlier version.

24 THE COURT: I have a hard copy and the one on the
25 screen. Why don't you give me the name of the charge that it's

1 on, and we'll work on it that way.

2 MR. VIEN: This is under Presumption of Innocence;
3 Proof Beyond a Reasonable Doubt, and it's the last paragraph.

4 THE COURT: Yes.

5 MR. VIEN: The last sentence says, "On the other hand,
6 if after fair and fair and impartial consideration of all the
7 evidence, you are satisfied beyond a reasonable doubt as to her
8 guilt, you should vote to convict her." I'd ask you to change
9 "should" to "may." I think it's getting too close to directing
08:44 10 the --

11 THE COURT: Isn't that right out of the Pattern?

12 MR. VIEN: It may be. I think it's wrong. And I know
13 what the Pattern may or may not say, but I still have to object
14 to it because I think it gets too involved in the jury's
15 province.

16 THE COURT: If they find after fair and impartial
17 consideration of all the evidence they're satisfied beyond a
18 reasonable doubt, under what circumstances should they not
19 convict her?

08:45 20 MR. VIEN: Because that's up to the jury to ultimately
21 convict. And I know we always say, you know, you can't argue
22 jury nullification and you're not supposed to talk about it and
23 we don't. But it's up to the jury whether or not to choose to
24 convict or not, and I think we're invading their province by
25 the word "should."

1 THE COURT: You want "It's your duty to convict her,"
2 just like a parallel construction?

3 MR. VIEN: No. Too strong. It's a different
4 situation between convicting people and acquitting people.
5 That's not parallel, obviously.

6 THE COURT: I'll look at it but I think I'm going to
7 leave that one. I think that's a very -- I think you're
8 banking on a jury nullification argument, and it's not proper.

9 MR. VIEN: As long as we don't argue jury
08:46 10 nullification, I think the jury can decide not to convict if
11 they don't want to convict.

12 THE COURT: I'll think about it, but I think I'm going
13 to leave that one. Next.

14 MR. VIEN: I had under Cooperating Witness, I don't
15 know. Should we make it plural because of Dr. Eaton?

16 THE COURT: I had it plural and I changed it because I
17 thought she was the only one. But if you want, I'm happy to
18 put in both. But then I need to make adjustments to the one
19 you passed up.

08:46 20 MR. BRADY: Your Honor, just on that one, you know, if
21 Eaton had immunity or had a cooperation agreement or anything
22 like that, then it might be appropriate. But it might just be
23 confusing, I think, to lump them in with someone like Winnie
24 Waruru, who clearly, she's clearly a cooperating witness here.

25 THE COURT: Well, he had a proffer letter, right?

1 MR. BRADY: Yes.

2 THE COURT: Did he say nobody made any promises to him
3 about whether or not he was going to be prosecuted?

4 MR. BRADY: Yeah, and there was some extended back and
5 forth about that. It was pretty clear about that.

6 MR. VIEN: I thought he said "I don't know if they're
7 going to prosecute me or not."

8 THE COURT: But he said no one had promised him he
9 wouldn't be, right?

08:47 10 MR. LOONEY: Correct.

11 MR. VIEN: Something to that effect.

12 THE COURT: Yeah. All right? I'll do something with
13 that one, too. I think that's fair.

14 MR. VIEN: And I may have just missed a version. The
15 version I'm using, it says "Use of sound recordings and
16 transcripts."

17 THE COURT: I took that out.

18 MR. VIEN: You took that out.

19 MR. BRADY: Can I make a suggestion? Whatever is
08:48 20 easier for the court, I flagged a couple of minor things. I
21 don't know if it's easier for the court to kind of go by pages
22 as we go through.

23 THE COURT: You can. I don't really care.

24 MR. BRADY: Or do you want to hear from the defense
25 and then hear from us? Whatever is easier.

1 MR. VIEN: I do enjoy Mr. Brady talking over me all
2 the time. Why don't I just go through mine.

3 MR. BRADY: That's fine. I will sit down. No
4 touching.

5 MR. VIEN: And on health care fraud on Count 2, I just
6 wanted to make reference to the indictment, to the charge
7 that's alleged in the indictment. Obviously I don't want them
8 convicting on some other health care fraud because there are a
9 few issues that we want to raise, not to the court but to the
08:48 10 jury, about the way Count 2 is charged.

11 So throughout the conspiracy and the other charges, I
12 just wanted more specificity of saying the health care fraud
13 charged in the indictment. So I don't know if you can cure
14 that one on that page or not.

15 THE COURT: I'll take a look at that, too. What are
16 your thoughts on the indictment going back with the jury?

17 MR. LOONEY: We'll need very redacted copy.

18 THE COURT: Very redacted. Yes. It's not going to be
19 a speaking thing that goes back to them.

08:49 20 MR. VIEN: We'll just have to see the redactions, Your
21 Honor.

22 THE COURT: Okay.

23 MR. LOONEY: If we can go back to the means and manner
24 and unanimity instruction, we don't want the jury thinking they
25 need to find and agree on each of the means and manner because

1 that's not what the law is. They just need to find the
2 elements are satisfied. There's some tension there.

3 MR. VIEN: The next thing, excuse me, on money
4 laundering, that relates to the argument we made earlier about
5 commingling of funds.

6 THE COURT: Yeah, I got that one.

7 MR. VIEN: And it looks like there was a standalone
8 willful blindness.

9 THE COURT: I took it out. I had that as like a
08:50 10 placeholder for what we were going to --

11 MR. VIEN: Do you have anything else?

12 If we didn't make it clear, on a unanimity argument,
13 it also extends to whether or not the defendant was a principal
14 aider or abetter. So we wanted to say that they have to be
15 unanimous on whether she was a principal or aider and abetter
16 on Count 2.

17 THE COURT: I don't think they do. Do you think they
18 need to be unanimous on that?

19 MR. VIEN: I think they do, yeah. Yes, excuse me.

08:51 20 THE COURT: Where does that come from?

21 MR. VIEN: I don't have a case, Your Honor.

22 THE COURT: I just don't think that's right.

23 MR. VIEN: It may not be. I just wanted to raise it
24 and ask for it.

25 THE COURT: You want it anyway. What's the

1 government's view on that? I mean, really that's just whether
2 or not we add a separate question to the verdict form, which we
3 haven't done. What's the government's view?

4 MR. BRADY: Yes, I think on this, Your Honor, I think
5 kind of simple is better. I think if we start adding in more
6 on aiding and abetting, I worry that the jury might start to
7 get confused about that.

8 THE COURT: I think it's a problem because there can
9 be, like, they've alleged a whole lot of different kinds of
08:51 10 fraud, right? I mean, they could think that she aided and
11 abetted some of them and she was the principal on others of
12 them, and I'm not sure how we parse any of them out. And I
13 don't think the law requires it to be unanimous as between the
14 two.

15 MR. LOONEY: Don't have much in the law, but what
16 Mr. Vien says, that the court may instruct the jury that it
17 does not need to be unanimous -- principal or abetter. So
18 having two questions, one or the other, would suggest unanimity
19 where it's not actually required.

08:52 20 THE COURT: Right.

21 MR. VIEN: Obviously that's where the law is right
22 now, Your Honor. Obviously we're going to be straightforward
23 with the court about what the law is, but we think the law
24 should be different and ask you to instruct on that.

25 THE COURT: I mean, yeah, I'm not going to change

1 that. But I mean, he's obviously going to raise an issue here.
2 I don't know that there's anything to this issue or not, but do
3 you want to drop the aiding and abetting theory? I just think
4 you're -- that's not really your case.

5 MR. BRADY: It's not, Your Honor. So I had a thought
6 on that. If you give me a moment, let me just flip to the
7 instruction so I have it in front of me.

8 THE COURT: You're going to the Aiding and Abetting
9 instruction?

08:53 10 MR. BRADY: Yeah. It's page 27 of my draft, Count 2,
11 Health Care Fraud, Aiding and Abetting.

12 THE COURT: It's 26 now, but okay.

13 MR. BRADY: So my concern, Your Honor, is one of jury
14 confusion here. We understand that aiding and abetting --
15 there's just one line on the verdict form, right, health care
16 fraud. And you can be liable as a principal on that or another
17 way that the defendant can be guilty is through aiding and
18 abetting. It's like an either/or.

19 My concern is, I just don't want the jury thinking
08:54 20 like it's just another set of elements, another thing they need
21 to decide. In other words, would it make sense to say that
22 something in here along the lines of, "If you find based on my
23 instructions that the defendant is guilty of health care fraud
24 as a principal, then your verdict on Count 2 should be guilty,
25 and there's no need to consider aiding and abetting." Because

1 I think that's how it works, right? I mean, if they determine
2 that, then there's no need for them to consider the aiding and
3 abetting theory.

4 THE COURT: Well, I'll put it in so it's an
5 alternative thing, but I'm not going to do that.

6 MR. BRADY: Okay. I think that's really kind of just
7 to make it clear to them that it's just an alternative to get
8 to the same question.

9 THE COURT: I'm going to muck around with the last
08:55 10 sentence of that charge, but I don't think I'm going to -- I
11 think I'm going to really get to the heart of what Mr. Vien is
12 looking for.

13 MR. BRADY: Your Honor, if I may tick through a couple
14 of other minor things --

15 THE COURT: Yes.

16 MR. BRADY: -- which you may have already caught. The
17 Law Enforcement Witnesses instruction, which in the draft I
18 have is page 16.

19 THE COURT: Yeah, I have it. Were there any former
08:55 20 law enforcement officers?

21 MR. BRADY: That was the point. There aren't. I
22 think our two law enforcement people are both currents, so I
23 think we can get rid of "former" and the references to "or may
24 have been," current or former.

25 THE COURT: Okay.

1 MR. BRADY: Okay. The Sound Recordings and
2 Transcripts, you already talked about that.

3 THE COURT: That's out.

4 MR. BRADY: That's out. In the instruction with the
5 heading, The Indictment, which I have on page 18, just in Count
6 2 of the indictment she's charged with committing and aiding
7 and abetting. I think there's just a typo in "aiding" in my
8 draft.

9 THE COURT: Right, got it. I'm not sure I want to
08:56 10 jump into this at this late date, but I charged it this way
11 because it's how you both proposed it, but we could also flip
12 the substantive and that conspiracies.

13 MR. BRADY: I think at this stage it's probably in
14 everybody's best interest just to leave it.

15 THE COURT: I usually do it the other way, but since
16 you both requested it the same way, I did it the way you wanted
17 it.

18 MR. BRADY: I would say that's not necessary at this
19 point.

08:57 20 In the instruction, so Count 1, Conspiracy to Commit
21 Health Care Fraud - Elements of the Offense. It starts on page
22 20 of my draft. And on the second page of that one, it's the
23 second paragraph up from the bottom. It begins, "The
24 government does not have to prove that the conspiracy succeeded
25 or was achieved."

1 THE COURT: You want the "overt act" out?

2 MR. BRADY: Yes, there's a reference to that at the
3 end.

4 THE COURT: Yeah.

5 MR. BRADY: Then in the next paragraph, Your Honor,
6 where it describes what the indictment alleges. There is at
7 the end of the first sentence, "Fraudulent statements in
8 connection with health care benefits to obtain payments from
9 Medicare and MassHealth." Our focus in the trial has been on
08:58 10 MassHealth. We haven't --

11 THE COURT: I'll just say "from MassHealth." That
12 just came from the defendant's instruction. That's how they
13 asked, but you're right, there hasn't been testimony about
14 Medicare. It's just going to say "MassHealth."

15 MR. BRADY: The next comment I had, Your Honor, is in
16 the instruction for Count 2, Health Care Fraud. My draft that
17 starts on page 23.

18 THE COURT: Yes, I have it.

19 MR. BRADY: And the note I had was on the next page,
08:58 20 page 24. It's the paragraph that begins, "A material fact or
21 matter is one that has a natural tendency."

22 THE COURT: Yeah.

23 MR. BRADY: So the third sentence in there that begins
24 "Again."

25 THE COURT: Yes.

1 MR. BRADY: I think, Your Honor, this is in some
2 version, whether it was defense or government's, there was a
3 reference to the regulatory instruction that was before this,
4 but now the sequence has changed. So I think if we get rid of
5 "again" and start with "A," I think that does the trick.

6 THE COURT: That's fine.

7 MR. BRADY: Then it's on page 26 in my draft, but it's
8 the last page of that same instruction, Your Honor.

9 THE COURT: Yes.

08:59 10 MR. BRADY: In the second to last paragraph there.

11 THE COURT: Yes.

12 MR. BRADY: There's another reference to, "A violation
13 of any of these rules and regulations is not a crime in and of
14 itself and is not determinative of the defendant's guilt or
15 innocence."

16 THE COURT: Right.

17 MR. BRADY: So on that, I would suggest the following
18 tweak just to make it parallel to what was said before about
19 the same issue.

09:00 20 THE COURT: This was my original instruction on it,
21 and I think something along the lines of "However, false
22 representations regarding compliance with these regulations can
23 be the basis for a guilty finding if this and all the other
24 elements of the charge to the offense are established beyond a
25 reasonable doubt."

1 Tell me where you're making a change. I have the
2 paragraph. I just don't know where you're inserting it.

3 MR. BRADY: So we've got the sentence that begins, "A
4 violation of any of these rules and regulations."

5 THE COURT: Yes.

6 MR. BRADY: So I think after that sentence, Your
7 Honor, it would make sense to add something like, "However,
8 false representations regarding compliance with these
9 regulations can be the basis for a guilty finding."

09:01 10 THE COURT: Hold on. "False representations regarding
11 compliance with" --

12 MR. BRADY: -- "with these rules and regulations can
13 be the basis of a guilty finding if this and all the other
14 elements of the charged offense are established by the
15 government beyond a reasonable doubt." I think that tracks
16 what you have earlier in that same instruction, Your Honor.

17 MR. VIEN: I think that implies that a violation of
18 the reg is an element of the offense, which I don't think it
19 is.

09:01 20 THE COURT: I'll take a look at it. I understand both
21 points.

22 MR. BRADY: Then one last point in the next sentence.

23 THE COURT: I have statuses at 9:00 and 9:15. So if
24 you can do this in 30 seconds or less.

25 MR. BRADY: Maybe just, it's on this one page right

1 here. The next sentence after that says, "The fact that
2 certain civil rules and regulations have been violated may only
3 be used by you to assist you." I think instead of "only," that
4 should say "also" because they can be used in that other way
5 that we just added in.

6 THE COURT: I'll take a look at that instruction.

7 MR. BRADY: Thank you, Your Honor.

8 MR. VIEN: Back at 10:00, Your Honor?

9 THE COURT: Yes. If this is everything, you don't
09:02 10 have to come back until 10:00.

11 MR. BRADY: I had just a few other things. It might
12 take five, ten minutes just to tick through the other ones. Or
13 I'm happy to share them with you.

14 THE COURT: Then you have to come back. I already
15 have these people waiting.

16 THE COURT: Come back at 9:30 if you want to go
17 through the others.

18 (Recess, 9:03 a.m. - 9:40 a.m.)

19 THE COURT: So is it Eaton? What is his name?

09:03 20 MR. LOONEY: Eaton.

21 THE COURT: Is it fair to say that he may have
22 participated in the crime?

23 MR. BRADY: Yeah, I think so.

24 THE COURT: I'll say "a crime." It's a different
25 crime.

1 MR. BRADY: Are you ready to tick through?

2 MR. VIEN: Sure.

3 MR. BRADY: Your Honor, whenever you're ready.

4 THE COURT: Let's go.

5 MR. BRADY: Okay. Just a few small things. Count 7,

6 Money Laundering Conspiracy.

7 THE COURT: Hold on.

8 MR. BRADY: In the third sentence that begins with,

9 "As with Count 1, the government must prove the existence."

09:40 10 THE COURT: Yes.

11 MR. BRADY: After the comma there, I think we want to

12 add in something like "and must prove." So it will read, "The

13 government must prove the existence."

14 THE COURT: "Must prove both of these things beyond a

15 reasonable doubt."

16 MR. BRADY: Yes, I think that was missing there.

17 THE COURT: Okay.

18 MR. BRADY: And then Counts 8 through 10, Money

19 Laundering, which in my draft is on the next page.

09:41 20 THE COURT: Yes.

21 MR. BRADY: In the first paragraph, in the second

22 sentence, I think there's just a typo. "Each of these three

23 counts."

24 THE COURT: Isn't that what it says?

25 MR. BRADY: It may just be the earlier draft, Your

1 Honor. I think there was -- it said, "Each of these three
2 counts." In my draft it says, "Each O these three counts."

3 THE COURT: That's been fixed.

4 MR. BRADY: Okay. And then just another one, at the
5 bottom of the page in my draft it's the paragraph that begins,
6 "The government does not have to prove that the defendant."

7 THE COURT: Yeah.

8 MR. BRADY: I think at the end of that sentence in my
9 draft where it says, "defendant committed either of these
09:42 10 offenses."

11 THE COURT: Yeah, thank you. That one we'll get.

12 MR. VIEN: Is that it?

13 MR. BRADY: If I may have just a moment. I think
14 that's it.

15 THE COURT: We'll have one more round, so if you
16 missed one, that's --

17 MR. BRADY: I think that's all for that, Your Honor.

18 THE COURT: Mr. Vien, do you have something else?

19 MR. VIEN: No, Your Honor.

09:42 20 THE COURT: All right. I'm going to work on these.

21 When you're looking at the next draft, because I may
22 pass it out to you during testimony, I'm redlining what I do
23 today. I think other than that, we've taken out recordings.
24 We took out the extra willful blindness instruction, which is
25 like a placeholder for me to remember it. And the things that

1 we may have added, I added versions of the things that the
2 government asked for yesterday or the day before. So those may
3 be all redlined today, but just make sure you go back and check
4 those. One was about unanimity and one was about -- what was
5 the other one?

6 MR. BRADY: Regulatory rules.

7 THE COURT: So if you do a word search on "regulatory"
8 and "unanimity," you should catch everything.

9 MR. BRADY: Could I raise one other brief thing, Your
09:43 10 Honor, relating to the testimony of Special Agent Wisnaskas,
11 which we're going to pick up with.

12 So yesterday the defense gave us a series of text
13 messages which we marked as an exhibit and introduced. And as
14 I flipped through -- and we haven't objected. It's in
15 evidence, Your Honor. But as I flip through some of these, it
16 looks like some of these, the only relevance of them that I can
17 discern is that they relate to other home health companies and
18 they were getting in trouble and what they were up to. And I
19 think there are also messages where it's again the only
09:44 20 relevance seems to be the defendant thought, well, maybe
21 MassHealth would ask for the money back; we just have to
22 reimburse it.

23 And I know, Your Honor, we moved on that beforehand
24 and we've had some discussion about that before. I just sort
25 of flag that as a concern. Again, it's in evidence, they're

1 going to see that. But just in case, not knowing exactly where
2 the defense intends to go with that, I just want to just sort
3 of note that as something that I see in these messages and is a
4 concern.

5 THE COURT: Okay. Like a motion?

6 MR. BRADY: It's not a motion, Your Honor. Just, if
7 there's objections, hopefully by mentioning it now --

8 THE COURT: Like when you have circle time and
9 everybody gets to share something.

09:44 10 MR. VIEN: He has concerns. He wants to share things.
11 He's very sensitive about stuff. I just let him talk when he
12 gets like this. Just let him vent.

13 MR. BRADY: My hope, Your Honor, is circle time here
14 can save us circle time over there. That's the reason why I
15 mention it.

16 MS. PASCUCCI: Your Honor, on that, I'll just note
17 that we have a revised copy of that exhibit to replace the
18 exhibit yesterday because we made a few quick changes, so I'll
19 just pass a copy to the government.

09:45 20 MR. LOONEY: I also have something to share for circle
21 time.

22 THE COURT: Yes.

23 MR. LOONEY: It's two things. One is the third
24 witness today. So it will be Mr. Special Agent Wisnaskas,
25 Ashleigh Marrier, then Robert Wyman. Robert Wyman is one of

1 the attorney witnesses, the one attorney witness who was an
2 attorney for Ms. Newton. So I just wanted to sensitize the
3 court that he is someone who probably is in possession of
4 privileged communications, and I anticipate I may lead him more
5 than I would otherwise to avoid getting into those.

6 MR. VIEN: I didn't think he could lead more than he
7 does otherwise, Your Honor, but I appreciate that.

8 MR. LOONEY: Touche.

9 THE COURT: Getting back to the witnesses on the stand
09:46 10 and the summary exhibits, we did some research on it last
11 night. And by "we," I mean the royal we. And my sense of
12 what's proper for summary charts was pretty on point. It's not
13 supposed to be any sort of argument. What the government had
14 on there was sort of in the -- it's probably okay. It's
15 probably okay the way you submitted it originally. The gray
16 area is wide. But I would still feel better if you took out
17 things like "note." I mean, you could probably leave in
18 "identical" if it's still in there.

19 MR. BRADY: That's what we did, Your Honor. We've
09:47 20 redacted out "note" parts so that won't be in the exhibits that
21 we show today.

22 THE COURT: Okay. There's other ways to do it. Like
23 you could have asterisk days, but I think the note thing is
24 problematic.

25 MR. BRADY: Understood.

1 MR. LOONEY: Then the one final thing that I have is,
2 we submitted a stipulation that the Bank of America is an FDIC
3 insured institution. We're hoping that can be read today
4 before our final witness, who is a forensic accountant, Bridget
5 Horn. Really she's going to be talking about Bank of America.

6 THE COURT: So that's 416?

7 MR. LOONEY: Yes.

8 THE COURT: And do you want me to read it or do one of
9 you want to read it? I'm happy to read it.

09:48 10 MR. LOONEY: That would be great.

11 THE COURT: Something to look forward to.

12 MR. LOONEY: Thank you.

13 THE COURT: Will you just let me know when I have it
14 right there.

15 MR. BRADY: Your Honor, if and when we rest today,
16 Your Honor, just with Petrozziello, do we need to do -- how
17 does Your Honor like to handle that? Do we need to do anything
18 formal, presumably outside of the presence of the jury, to move
19 to admit or some finding relating to Petrozziello?

09:48 20 THE COURT: Mr. Vien and Ms. Pascucci are entitled to
21 be heard on that. Subject to the argument, it seems to me that
22 they linked everything up sufficiently. The only, you know,
23 kind of issue that comes up in my mind, and there's been no
24 evidence on it yet, is how you're going to parse out like what
25 comes in under each conspiracy.

1 MR. BRADY: Okay.

2 THE COURT: If he's going to make an issue of that,
3 which I know he alluded to it earlier --

4 MR. BRADY: I'm hopeful that, having dismissed the
5 kickback conspiracy, that issue has fizzled.

6 THE COURT: The evidence could be very discrete as to
7 the two conspiracies.

8 MR. BRADY: Could be, Your Honor. I'm not sure. I
9 mean, today we're going to spend a bunch of time talking
09:49 10 through the financial, the evidence relating to the money
11 laundering conspiracy.

12 THE COURT: I mean, I could -- I mean, we'll see what
13 they want to do with it. We could give an instruction sort of
14 that -- I mean, are there co-conspirators to the money
15 laundering conspiracy? Like, who are the co-conspirators on
16 the money laundering conspiracy?

17 MR. BRADY: For that it's the husband, Ben.

18 THE COURT: Okay. So we could say that, we could just
19 come up with, let's see what Mr. Vien wants to do with it. We
09:50 20 could come up with some kind of instruction to the extent that
21 comes up. For the money laundering conspiracy I told them that
22 things that other people -- co-conspirator statements -- just
23 say to them that they can only consider statements made by the
24 husband in the money laundering conspiracy and then leave the
25 rest of it, because the other statements shouldn't be relevant

1 to the money laundering conspiracy, right?

2 MR. VIEN: I think it's a mess, Your Honor, and I
3 don't want to fix it for them.

4 THE COURT: Well, let's give some thought to that.
5 And I don't know -- I have to dump this back on poor Thomas.
6 Can you see if there's any rules on co-conspirator statements
7 with overlapping conspiracies? Because that may just be an
8 admissibility issue, right?

9 MR. VIEN: You admitted it all provisionally.

09:51 10 THE COURT: I mean, once it's in, I mean, the rule may
11 be once it's in, it could be considered for any purpose, right?
12 I don't know.

13 MR. VIEN: I disagree with that.

14 THE COURT: I don't know.

15 MR. VIEN: I think that's the whole Petrozziello
16 situation.

17 MR. BRADY: The lone co-conspirator for the money
18 laundering is also a co-conspirator for the other conspiracy,
19 for the health care fraud conspiracy. And so I'm trying to
09:51 20 think about like the statements of co-conspirators that we're
21 seeking to introduce in connection with just the money
22 laundering conspiracy. All of which is to say, Your Honor, I
23 don't know how much of an issue this is going to end up being.

24 THE COURT: Let's see what it is. I don't know; the
25 government keeps charging all these multiple conspiracies. I

1 mean, this is just my perspective on it. You don't need the
2 money laundering conspiracy here, right? Like, either they
3 laundered the money or they didn't, right? I mean, that's what
4 your argument is, right? There's no failed money laundering
5 efforts here, right, that they need the conspiracy for.

6 So I know you guys didn't draft the indictment, but
7 these multiple conspiracies create like this crazy problem when
8 you don't really need them if you look at the facts of this
9 case. I'm just saying.

09:52 10 MR. LOONEY: I will tell you that there are two
11 reasons for the conspiracy. One is to avoid a limitation on
12 the admissible evidence as to, you know, there are two discrete
13 or three discrete substantive charges, but we'll be introducing
14 evidence of money laundering beyond that because of the
15 conspiracy. And then the second is there are forfeiture
16 implications. That is the reason for that.

17 THE COURT: Why would there be forfeiture
18 implications?

19 MR. LOONEY: Because property becomes forfeitable if
09:53 20 it is acquired with funds involved in the offense of money
21 laundering. And it is a broader -- money laundering is a
22 broader forfeiture predicate than health care fraud. And so
23 any properties purchased with funds involving money laundering
24 become forfeitable, which is broader than forfeiture available
25 in health care fraud. I just want you to know that we don't do

1 this with no reason.

2 THE COURT: The tail wagged the dog.

3 MR. LOONEY: That may be it.

4 THE COURT: But anyway, I will see what he comes up
5 with on Petrozziello. That may keep us from charging on the
6 substantive offenses today. We may need to work through that.

7 I'm at least going to charge on the first half today if I
8 possibly can. All right.

9 (Adjourned, 9:52 a.m.)

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11 /s/ Kelly Mortellite

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